or property." The District Court then issued a nationwide injunction to halt these illegal actions. The Hobbs Act prohibits anyone from "commit[ting] or threaten[ing] physical violence to any person or property in furtherance of a plan or purpose" of obstructing commerce. In this case, petitioners' ongoing campaign of threats and violence are preventing patients from accessing legal and necessary health services. Nothing in the statute's history justifies their assertion that the Hobbs Act prohibition of threats and acts of violence should not be read as it is written. The District Court's injunction against further violations of the Hobbs Act should therefore be upheld.

ARGUMENT

I. THE NATIONWIDE CAMPAIGN OF TERROR BY PETITIONERS AGAINST ABORTION PROVIDERS, STAFF, AND CLINICS LIMITS WOMEN'S ALREADY RESTRICTED ACCESS TO REPRODUCTIVE HEALTH CARE

At the time PLAN and Operation Rescue carried out the acts of violence and threats against clinics in this case, a pervasive national climate of violence against reproductive health care providers existed. Petitioners helped create and perpetuate this climate of violence—with the goal of closing down women's health care providers nationwide. The nationwide injunction established in this case has protected clinics for years from petitioners' violent acts and intimidation. If it is lifted, those clinics will be left vulnerable, and petitioners will be emboldened to renew their illegal activities. Violence against women's health care facilities harms women by reducing the number of women's health care clinics and staff.

A. REPRODUCTIVE HEALTH CARE PROVIDERS ARE THE TARGETS OF DOMESTIC TERRORISM

Clinics have suffered massive physical damage from anti-abortion extremist violence during the past thirty years, including blockades, invasions, bombings, arson, chemical attacks, gunfire, bomb threats, death threats, and arson threats.

In 1993 the violence turned deadly. Since then, eight abortion providers or staff have been murdered by anti-abortion extremists; twenty have been wounded, some critically. In Pensacola, Florida, in 1993 after the publication of a Wild West-style "UN-WANTED" poster, Dr. David Gunn was shot and killed at the rear entrance of Dr. Wayne Patterson's clinic while Rescue America staged a protest at the front of the clinic; Michael Griffin was sentenced to life in prison. Rescue America was founded by Donald Treshman, who was a regional director of PLAN. Michael Bates, *Woman Arrested in the Wounding of Abortion Doctor*, Associated Press, Aug. 20, 1993; Test. of Joseph Scheidler, Trial Tr., at 3990. The same year, in August in Mobile, Alabama, Dr. Wayne Patterson himself was shot and killed, again after the publication of an "UN-WANTED" poster. Cindy West, *Shooting: Protest, Random Violence?*, Pensacola News J., Aug. 23, 1993, at A1.

In Wichita, Kansas, in 1993, Dr. George Tiller was shot at point blank range in his car by Rachelle "Shelly" Shannon. Bates, *supra*. Shannon was active in Operation Rescue as early as 1988 when she was arrested as part of petitioner's campaign to blockade clinics in Atlanta. James Risen & Judy L. Thomas, *Wrath of Angels: The American Abortion War*, 275 (1998). The Army of God manual, a how-to primer on violence against reproductive health care clinics including

bomb-making instruction, was discovered buried in Shannon's yard during a police search. Judy Lundstrom Thomas, *Manual Instructs Anti-Abortionists on Bomb-Making*, Times-Picayune (New Orleans), Oct. 2, 1994, at A15.

In 1994, Dr. John Bayard Britton and volunteer escort Lt. Col. James Barrett were shot and killed in the clinic driveway. Paul Hill was sentenced to death and ultimately executed for this crime. June Barrett, Lt. Col. Barrett's wife, was also shot and wounded in the attack. *Hill Sentenced to Death in Clinic Killings*, Baltimore Sun, Dec. 7, 1994, at A1.

Following the murders of Drs. Gunn and Britton and Lt. Col. Barrett, anti-abortion extremists circulated and signed "justifiable homicide" petitions. One petition stated in part:

> We, the undersigned, declare the justice of taking all godly action necessary, including the use of force to defend innocent human life (born and unborn). We proclaim that whatever force is legitimate to defend the life of a born child is legitimate to defend the life of an unborn child.
>
> We declare and affirm that if in fact Paul Hill did kill or wound abortionist John Britton and accomplices James Barrett and Mrs. Barrett, his actions are morally justified if they were necessary for the purpose of defending innocent human life.

United States v. McMillan, 946 F. Supp. 1254, 1263-64 (S.D. Miss. 1995) (quoting from the justifiable homicide petition). Signers of this justifiable homicide petition included leaders of organizations involved in PLAN, including Andrew Burnett (a Regional Director of PLAN). Test. of Joseph Scheidler, Trial Tr., at 3990; *Planned*

Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 41 F. Supp. 2d 1130, 1140 (1999), *aff'd in part*, 290 F.3d 1058 (9th Cir. 2002) (noting that Burnett signed petition) and Roy McMillan, an organizer of a PLAN conference. Pls' Ex. 608; *McMillan*, 946 F. Supp. at 1263 (noting that McMillan signed petition).

In 1997, in Atlanta, seven people were injured in two bombings at the Northside Family Planning Clinic. Donald Plummer, *Olympic Blast Still Haunts Officials*, Atlanta J.-Const., Feb. 23, 2002, at 9A. The second bomb, targeting law enforcement and emergency rescue personnel, was detonated an hour after the first. *Id.* The Army of God claimed credit for these attacks. Jack Warner, *Rudolph Indicted in Four Bombings*, Atlanta J.-Const., Nov. 16, 2000, at 7C. After five years as a fugitive, Eric Robert Rudolph was captured, charged, and pled guilty to the bombings. Donald Plummer & Cameron McWhirter, *Rudolph Cuts Deal: Olympic Bombing Suspect to Plead Guilty*, Atlanta J.-Const., Apr. 9, 2005, at 1A.

In 1998, Dr. Barnett Slepian was shot and killed in his home by a sniper as he stood in front of his kitchen window. James Charles Kopp was indicted for this murder, and after two and one-half years as a fugitive, was captured and convicted of murder. Michael Beebe, *Kopp Gets Maximum Term, Amherst Doctor's Killer to Serve 25 Years to Life*, Buffalo News, May 9, 2003, at A1. Like Rachelle Shannon who was convicted of attempting to murder Dr. Tiller, Kopp was active in Operation Rescue as early as 1988 when he too was arrested as part of Petitioner Operation Rescue's campaign to blockade and shut-down clinics in Atlanta during the Democratic National Convention. Risen & Thomas, *supra*, at 275.

In 1998, off-duty police officer Robert Sanderson was killed in a bomb explosion at the Birmingham, Alabama, New Woman, All Women Clinic where he worked as a security guard; clinic nurse Emily Lyons was maimed in the attack. Warner, *supra*. The Army of God claimed credit for the bombing, and Eric Robert Rudolph was charged and convicted. Editorial, *Elusive Fugitives*, USA Today, June 2, 2003, at 10A.

From 1977 until 1999 (the year the injunction in this case was issued), as reported to the National Abortion Federation (NAF), 161 women's health care facilities were the target of arson; 40 were bombed; and 77 clinics were the targets of attempted bombings or arsons. *NAF Violence and Disruption Statistics, at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/violence_statistics.pdf (last visited Oct. 18, 2005).[2] Together, the arsons and bombings have caused close to fifteen million dollars in property damage. NAF, *History of Violence—Arsons and Bombings, at* http://www.prochoice.org/about_abortion/violence/arsons.asp (last visited Oct. 18, 2005).

A periodic national social science survey of abortion providers found that in 1993 fifty percent of clinics surveyed had experienced severe violence. *2000 Feminist Majority Foundation National Clinic Violence Survey Report*, 2001, 5 at http://www.feminist.org/research/cvsurveys/clinic_survey2000.pdf (2000 FMF Survey).[3] National efforts

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[2] These incidences include only those reported directly to the National Abortion Federation. The actual numbers are even higher.

[3] "Severe Violence" is defined as "blockades, invasions, bombings, arsons, chemical attacks, stalking, physical violence, gunfire, bomb threats, death threats, and arson threats." *2000 FMF Survey, supra*, at 5. The Feminist Majority Foundation's clinic violence survey sends

(Continued on following page)

by women's rights supporters, including this lawsuit and the passage of the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, have decreased some of the violence faced by clinics. In 2002, twenty-three percent of clinics surveyed reported being the target of extreme violence. *2002 Feminist Majority Foundation Clinic Violence Survey Report*, 2002 *at* http://www.feminist.org/research/cvsurveys/clinic_survey2002.pdf at 3 (2002 FMF Survey).

For years, the injunction established in this case has protected clinics across the country from petitioners' violent acts and intimidation. If the injunction is lifted, petitioners will be emboldened to renew their illegal activities and domestic terrorism against women's health clinics may once again dramatically increase.

B. UNCHECKED VIOLENCE FURTHER RESTRICTS WOMEN'S ALREADY LIMITED ACCESS TO REPRODUCTIVE HEALTH CARE

The failure to protect women's health care providers harms not only the providers and clinic staff, but ultimately all women who seek reproductive health care services. According to a Senate Report on FACE:

> Some providers have succumbed to the intimidation and threats. At least three physicians in Dallas stopped performing abortions in 1992 as a

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questionnaires to all facilities it can identify as providing abortion services in the United States. In 2000, surveys were sent to 798 providers; 361 responded for a response rate of 45%. In 2002, surveys were sent to 739 providers; 338 responded for an overall response rate of 46%. Analysis on the received data is conducted using SPSS (Statistical Package for the Social Sciences).

> result of pressure by anti-abortion groups. In early 1993, after receiving death threats, two doctors stopped working at an abortion clinic in Melbourne, FL. And since Dr. Gunn was shot in March 1993, at least eight more doctors have stopped offering abortion services.

Freedom of Access to Clinic Entrances Act of 1993, S. Rep. No. 103-117, at 17 (1993).

In 1993, after the murder of Dr. Gunn, twenty-three percent of clinics surveyed had staff or physicians resign because of violence or harassment. *2000 FMF Survey*, *supra*, at 13. In 1999, after the murder of Dr. Barnett Slepian, ten percent of clinics surveyed reported that a physician or other staff had quit their jobs as a result of anti-abortion violence, harassment, or intimidation. *Id.* In 2002, staff members were much more likely to resign at clinics experiencing high levels of violence. *2002 FMF Survey*, *supra*, at 14.

Violence against women's health care clinics and providers makes access to abortion for many a right in theory only. Between 1992 and 1996, the number of abortion providers decreased by fourteen percent. *Id.* Between 1996 and 2000, the number of abortion providers continued to decline in thirty-eight states and the District of Columbia. Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 Persp. on Sexual & Reprod. Health, at Table 3 (Jan.-Feb. 2003). Consequently, as of 2000, only thirteen percent of counties in the United States had abortion providers. Alan Guttmacher Institute, *Facts in Brief, Induced Abortion*, May 2005, *at* http://www.agi-usa.org/pubs/fb_induced_abortion.html (last visited Oct. 18, 2005).

The shrinking numbers of abortion providers place an extreme burden on women. In addition to the cost of an abortion (which, in most states is not covered by public funding or insurance[4]), women are forced to travel further at greater costs to and from the clinic and take time off from work. Additionally, the smaller number of providers means that some doctors have to travel from state to state in order to make sure that women's access to abortion is maintained. At trial, Dr. Susan Wicklund testified that she would fly from Wisconsin to Fargo, North Dakota. Dr. Wicklund's trips to Fargo were necessary because "they were having a real hard time finding physicians to keep [the clinic] open." Joint Appendix at 115, Test. of Dr. Susan Wicklund.

When a clinic is closed because of anti-abortion violence, some women lose their only chance to have an abortion. In these cases, anti-abortion extremists successfully deny a woman her Constitutional rights and force her to accept the extremists' decision of what her future should be. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part and dissenting in part) (noting that restrictions on abortion deprive a woman of "basic control over her life").

For other women, a closed clinic means waiting longer for an abortion. At trial, Ms. A, a woman carrying a fetus with a condition incompatible with life, testified how she traveled to Wichita, Kansas. PLAN's forcible blockade of the clinic there made her postpone her visit for three days. Test.

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[4] In 33 states and the District of Columbia, public funding for abortion is restricted. *See Who Decides?* NARAL Pro-Choice America Foundation website, *at* http://www.prochoiceamerica.org/yourstate/whodecides/trends/issues_low_income.cfm (last visited Oct. 18, 2005).

of Ms. A, Trial Tr., at 768, 774. For some, the delay increases the possibility of complications and decreases the chances that a provider will be available for the abortion. *See, e.g.*, Stanley Henshaw, *Factors Hindering Access to Abortion Services*, 27 Fam. Plan. Persp. 54, 56 (Mar./Apr. 1995). In those situations where the clinic remains open but the patient has to survive a gauntlet of abuse and harassment, several courts have noted the adverse medical effects on patients. *See, e.g., Madsen v. Women's Health Ctr.*, 512 U.S. 753, 758 (1994) (according to the clinic doctor, patients "manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures"); *Operation Rescue v. Planned Parenthood*, 975 S.W.2d 546, 551 (Tex. 1998) ("Physicians reported increased respiration, heart rate, and blood pressure.").

When anti-abortion violence closes down a clinic, it also has the effect of shutting down the only source of any type of reproductive health care for many women. Clinics that provide abortions also provide a wide range of health related services for women. 2002 FMF Survey, *supra*, at 5 (96% of clinics surveyed provide birth control,[5] 83% provide pregnancy counseling, 88% provide emergency contraception, 80% provide testing for sexually transmitted diseases, 51% provide adoption counseling and referrals, 66% provide cancer screening, 49% provide services relating to menopause, 60% provide HIV/AIDS testing, and 21% provide pre-natal care).

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[5] Petitioners are also opposed to the use of birth control. *See, e.g.*, Pls' Ex. 519 at 3.

II. THE NATIONWIDE INJUNCTION IS NECESSARY TO PROTECT CLINICS FROM VIOLENCE

The nationwide injunction issued in this case pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, is a critical tool for providers struggling to protect themselves from anti-abortion extremist violence that continues to threaten the existence of many women's health care clinics. This Court should affirm the injunction.

A. PLAN AND OPERATION RESCUE USED VIOLENCE TO SHUT WOMEN'S HEALTH CARE CLINICS

In granting the injunction, the District Court listed several acts of violence committed by PLAN and Operation Rescue members, including trapping clinic staff and volunteers against entrances as the volunteers and staff pleaded to be set free; banging on the car of a patient and grabbing her as she tried to enter the clinic; forcibly entering a clinic and destroying medical equipment, tearing down cabinets, and chaining themselves to an operating table; trapping clinic staff and escorts against entrance doors for hours; and assaulting a patient in California who lost consciousness, bled, and was rushed to the hospital. *NOW v. Scheidler*, No. 86-C788, 1999 U.S. Dist. LEXIS 11980, at *6-11 (N.D. Ill. July 28, 1999). As one witness described it:

> Mr. Joseph Scheidler entered our building in Delaware, stormed up the steps with two or three other men with him, came in and stormed his way into our administrator's office, said he was there to "case the joint" and told her that she needed to find another job. . . . I was present at

> the protest that he had organized and was speaking to the next day, and he had threatened me at that time that he would make sure the clinic was closed down, that he was there to make Delaware an abortion-free state, that our business would be closed, that I would feel the pain and fear that he had announced.

Test. of Susan Hill, Trial Tr., at 663-64, 668. The day after Scheidler "cased" the Delaware clinic, "a protest occurred and PLAN members entered the clinic and caused considerable property damage by destroying equipment. PLAN reported this protest in its newsletter and other public relations materials as a 'fun time.'" *NOW v. Scheidler*, 1999 U.S. Dist. LEXIS 11980, at *17.

Similarly, the Court of Appeals found that the "record is replete with evidence of instances in which [petitioners'] conduct crossed the line from protected speech into illegal acts, including acts of violence." *NOW v. Scheidler*, 267 F.3d 687, 700 (7th Cir. 2001). The Court of Appeals also noted petitioners' tactic was to threaten clinics that unless a clinic shut down voluntarily, it would be closed by the petitioners' actions. *Id.* In addition, the jury found that the petitioners committed 117 acts of extortion and 4 acts of violence as part of their campaign to close down women's clinics. *Id.*

B. INJUNCTIONS ARE A WELL ESTABLISHED, EFFECTIVE METHOD TO ENSURE ACCESS TO CLINICS

Enjoining violence, blockades, invasions, harassment, and noise are well established, effective means of protecting women's health clinics. *See, e.g., Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994). Both clinics and law

enforcement officials credit injunctions with limiting violence. In a Government Accounting Office survey, several clinics and law enforcement respondents pointed to injunctions as a reason that anti-abortion violence had been reduced. United States General Accounting Office, *Abortion Clinics, Information on the Effectiveness of the Freedom of Access to Clinic Entrances Act*, GAO Report No. GGD-99-2, 13-14 (Nov. 1998).

Other courts faced with the tactics of the petitioners and their organizations consistently have found that these petitioners committed violent acts in their attempts to limit women's access to reproductive health care and have issued injunctions against them. *See, e.g., Operation Rescue v. Planned Parenthood*, 975 S.W.2d 546, 550 (Tex. 1998); *Planned Parenthood of Mass. v. Blake*, 631 N.E.2d 985, 990-91 (Mass.), *cert. denied*, 513 U.S. 868 (1994); *Fargo v. Lambs of Christ*, 488 N.W.2d 401, 406 (N.D. 1992); *Ne. Women's Ctr., Inc. v. McMonagle*, 939 F.2d 57, 59 (3d Cir. 1991), *cert. denied*, 493 U.S. 901 (1989); *City of Atlanta v. Operation Rescue*, Pls' Ex. 926, *City of Atlanta v. Operation Rescue*, No. D-61462 (Superior Court of Fulton County, Mar. 28, 1990).

Injunctions were issued against those attacking the clinics in all of these cases. As in those cases, the injunction in this case is crucial in protecting the rights of clinic workers and patients, and preventing petitioners and their organizations from resuming their attacks against reproductive health care clinics. Removing the District Court's injunction would embolden the lawlessness of PLAN and its associates and would waste precious law enforcement and judicial resources by forcing clinics, prosecutors, and police to bring individual suits to protect individual facilities.

C. THE PETITIONERS' NATIONWIDE CAMPAIGN REQUIRES A NATIONWIDE RESPONSE

A nationwide problem requires a nationwide solution. From its inception, PLAN's nationwide scope set it apart from prior anti-abortion activities; PLAN's goal was to shut down women's clinics across the country. Pls' Ex. 4A; Trial Tr., at 976 (Test. of Maureen Burke, Coordinator of NOW's Project Stand Up for Women) (describing NOW's monitoring of Scheidler's and PLAN's activities). In a fundraising letter, Scheidler claimed to have visited forty cities within the United States, organized the first national "activist" anti-abortion conference, and met in Rome, Italy, with representatives from thirty-four countries. Pls' Ex. 650. As described by Scheidler in 1984, "I think it was a very good thing for us to get together in Fort Lauderdale and organize this kind of pro-life mafia to work in concert on important activists programs. I think we are obliged to give strong leadership to all the new people who want to get active." Pls' Ex. 647. The schedule of PLAN's activities in 1984-1985 included numerous nationwide action days. Pls' Ex. 721.

Similarly, Operation Rescue, a petitioner in this case, advertised its actions on a national scale and organized attacks throughout the country. S. Rep. No. 103-117, *supra*, at 12-13 (Test. of former Attorney General Janet Reno, noting that "much of the activity had been orchestrated by groups functioning on a nationwide scale including, but not limited to Operation Rescue, whose members and leadership have been involved in litigation in numerous areas of the country"; Test. of former New York Attorney General Robert Abrams describing litigation brought by his office against Operation Rescue leaders from California, Georgia, Virginia, and elsewhere).

Faced with an unprecedented nationwide attack strategy, the clinics and NOW sought to defend themselves with a nationwide lawsuit seeking a nationwide remedy. Use of federal law and federal courts for this action was the logical response to the national scope of the attacks and a reflection of the fact that the patchwork of state laws, coupled in some cases by lax or nonexistent enforcement of those laws, did not provide adequate coverage for individual clinics or the women who attempted to use them for health care. *Id.* at 13, 19.

The District Court's nationwide injunction must stay in place even though FACE has passed. It is important to point out that the campaign of terror against abortion providers waged by the petitioners well preceded the passage of FACE and is certainly persisting beyond it. Indeed, the District Court specifically found that petitioners' blockades and attacks on clinics had continued even with FACE in place. *NOW v. Scheidler*, 1999 U.S. Dist. LEXIS 11980, at *51-52. The court concluded that a nationwide injunction was necessary because of the national scope of petitioners' activities, petitioners' willingness to cross state lines to close abortion clinics, and the "blitzkrieg" nature of petitioners' actions that made obtaining individual FACE injunctions difficult. *Id.* at *52.

III. PETITIONERS VIOLATED THE HOBBS ACT WHEN THEY COMMITTED AND THREATENED PHYSICAL VIOLENCE IN ORDER TO OBSTRUCT AND DELAY COMMERCE IN REPRODUCTIVE HEALTH SERVICES

As described in Section II.A., *supra*, in the mid-1980's, Joseph Scheidler and his associates engaged in a campaign to terrorize abortion providers, women's health

care clinic staff, and patients. These activities went far beyond legitimate political protest, and included forcible violent blockades and invasions of women's reproductive health care clinics throughout the country. These activities were part of a comprehensive plan to obstruct and delay the provision of reproductive health services. It is indisputable that the provision of reproductive health services is a large and crucial component of the interstate commerce in health services generally, and also indisputable that petitioners' actions obstructed, delayed, and otherwise inhibited the provision of those services.

In response to this nationwide onslaught, respondents sued petitioners in the United States District Court for the Northern District of Illinois, seeking a nationwide remedy in the form of an injunction. Respondents sought this injunction in part under the provisions of the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961-68. After this Court held that the respondents' claims could go forward under RICO, *see NOW v. Scheidler*, 510 U.S. 249 (1994) (*NOW I*), a six-member jury found that petitioners had engaged in 121 predicate acts under RICO. The District Court entered a permanent nationwide injunction based on these findings.

A. THIS COURT HAS NOT YET ADDRESSED WHETHER THREATS AND VIOLENCE CONSTITUTE AN INDEPENDENT BASIS FOR HOBBS ACT LIABILITY

In *NOW II*, this Court held that petitioners' actions did not violate the Hobbs Act's narrow definition of extortion, and that the nationwide injunction could not be based on any of the jury's extortion-related findings.

Scheidler v. NOW, 537 U.S. 393 (2003). This Court did not rule on the remainder of the jury's verdict, however. In addition to the findings with regard to extortion, the jury also found that the petitioners had committed four "acts or threats of physical violence to any person or property." *See NOW v. Scheidler*, 91 Fed. Appx. 510, 511-12 (7th Cir. Feb. 26, 2004) (unpublished op.). These acts relate to a portion of the Hobbs Act that was not at issue in *NOW I* or *NOW II*. *NOW I* dealt only with RICO itself, and *NOW II* involved only the portion of the Hobbs Act that prohibits obstruction of interstate commerce "by robbery or extortion." *See* 18 U.S.C. § 1951(a). The additional four acts not at issue in *NOW II* involve the portion of 18 U.S.C. § 1951(a) that prohibits obstruction of interstate commerce by someone who "commits or threatens physical violence." *Id.* As the Court of Appeals properly noted, this Court's opinion in *NOW II* did not mention the four acts of threats and violence, and the parties' briefs in that appeal referred to the acts only in passing in footnotes. *Scheidler*, 91 Fed. Appx. at 513.

This Court's entire legal analysis in *NOW II* related to the scope of the first prong of the Hobbs Act. The singular focus of this Court's *NOW II* opinion is on the meaning of the term "extortion." Nothing the Court said about the interpretation of the Hobbs Act in that opinion in any way relates to the key terms in the second prong of 18 U.S.C. § 1951(a): "commits or threatens physical violence." Although the Court's legal analysis in *NOW II* does not relate to the second prong of the statute, the facts noted by the Court in *NOW II* are relevant to the "commits or threatens physical violence" as well as to the "robbery or extortion" prong of the Act. As noted in *NOW II*, "[t]here is no dispute in these cases that petitioners interfered with,

disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights. Likewise, petitioners' counsel readily acknowledged at oral argument that aspects of his clients' conduct were criminal." *NOW II*, 537 U.S. at 408-09. Thus, as a factual matter this Court has already recognized that petitioners have committed and threatened physical violence, which had the effect of obstructing respondents' activities in interstate commerce.

Given the four jury findings not at issue in *NOW II*, as well as this Court's recognition that the petitioners engaged in violent criminal acts that disrupted respondents' businesses, the only remaining question is whether the Hobbs Act violations described by the statutory terms "commits or threatens physical violence" are distinctive from those described by the statutory terms "robbery or extortion."

B. THE TEXT OF THE HOBBS ACT REQUIRES TREATING THE "COMMITS OR THREATENS PHYSICAL VIOLENCE" OFFENSE AS DISTINCT FROM THE "ROBBERY OR EXTORTION" OFFENSE

Any dispute over statutory meaning "begins where all such inquiries must begin: with the language of the statute itself . . . In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

This Court has repeatedly expressed its "reluctance to treat statutory terms as surplusage." *Babbitt v. Sweet Home Chapter of Cmties. for a Great Or.*, 515 U.S. 687, 698 (1995). *See also ASARCO, Inc. v. Kadish*, 490 U.S. 605, 629 (1989) (rejecting a suggested interpretation of statutory language that would "render that language redundant," and requiring a reading that gives different statutory terms independent meaning); *Potter v. United States*, 155 U.S. 438, 446 (1894) (statutory term "cannot be regarded as mere surplusage; it means something"). Petitioners' argument in this case violates these interpretive principles by subsuming the "physical violence" prohibition of the Hobbs Act into the "robbery or extortion" portion of the Act. The only way to avoid this redundant reading of the Act is to give the "physical violence" language a meaning independent of the Act's other provisions. This is contrary to neither the Act's grammar nor its history.

Section 1951(a) of the Hobbs Act provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). This section of the Hobbs Act contains three distinct components. The first component describes the scope of economic activities covered by the statute. Thus, behavior is prohibited only if it "obstructs, delays, or affects commerce or the movement of any

article or commodity in commerce." The second and third components of Section 1915(a) then describe two distinctive categories of prohibited behavior. The first category of prohibited behavior includes robbery, extortion, and attempts or conspiracies to engage in robbery and extortion. The second category of prohibited behavior includes acts and threats of physical violence to persons or property "in furtherance of a plan or purpose to do anything in violation of this section." *Id.*

By attempting to subsume the second category of prohibited behavior into the first, the petitioners effectively render the Act doubly redundant. First, under petitioners' interpretation, the "commits or threatens physical violence" language is redundant because the terms "robbery or extortion" already cover both nonviolent and violent manifestations of those prohibited acts. Second, the petitioners' interpretation would render redundant the statutory language "physical violence . . . in furtherance of a plan or purpose to do anything in violation of this section" because the "robbery or extortion" provision already covers anyone who "attempts or conspires" to engage in robbery or extortion. Thus, violence that occurs as part of a plan to commit robbery or extortion is already covered by the language prohibiting attempts and conspiracies. Under petitioners' interpretation, Congress could have omitted entirely the "commits or threatens physical violence" language without in any way changing the scope of Section 1951(a).

The only way to avoid this unacceptable result is to treat acts and threats of physical violence as an independent violation distinct from robbery and extortion. This interpretation is grammatically more consistent with the

phrasing of the Hobbs Act than petitioners' redundant reading.

First, the "commits or threatens physical violence" language of the Act is separated by a comma from the "robbery or extortion" language, indicating a distinction between the two components of the statute. *See Ron Pair Enters., Inc.*, 489 U.S. at 241 (discussing the grammatical structure of a statute, and noting that phrases set apart by commas "stand[] independent of the language that follows").

Second, the phrasing of the statute is disjunctive. The "robbery or extortion" and "commits or threatens physical violence" violations are joined by the word "or," which again indicates that the two sets of prohibited behaviors are mutually exclusive and independent violations of the Act. "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). To paraphrase this Court's conclusion in *Reiter*, Congress's use of the word "or" makes plain that the phrase "robbery or extortion" was not intended to modify the phrase "commits or threatens physical violence" nor was "commits or threatens physical violence" intended to modify "robbery or extortion." *See id.*

Finally, the phrase "in furtherance of a plan or purpose to do anything in violation of this section" logically refers to the Act's primary objective of prohibiting any action that "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce," since violence occurring in conjunction with conspiracies,

attempts, and acts of robbery and extortion would already be covered by the robbery and extortion portion of the Act.

C. THE LEGISLATIVE HISTORY OF THE HOBBS ACT SUPPORTS TREATING THREATS AND VIOLENCE AS A SEPARATE OFFENSE FROM EXTORTION AND ROBBERY

The plain language of the Hobbs Act prohibits anyone from committing or threatening acts of physical violence to person or property if those acts or threats would obstruct, delay, or affect interstate commerce. Nothing in the statutory language links this prohibition to the separate offense of obstructing commerce by acts of robbery and extortion. Since the statutory language is clear, no further interpretive effort is required to determine the meaning of the statutory terms.

> As in all statutory construction cases, we begin with the language of the statute. The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." . . . The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'"

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

Despite the clear application of the Hobbs Act statutory language to the violent and threatening acts in this case, petitioners nevertheless argue that this Court should ignore the statutory language creating a separate category of obstructions and subsume the prohibition of violence and threats into the prohibition of robbery and extortion.

Nothing in the legislative history supports this interpretation.

The legislative history is silent on the reason Congress prohibited violent and threatening acts obstructing commerce. Much of the history of the Hobbs Act is recounted in this Court's opinion in *NOW II*. In short, the Hobbs Act was preceded by the Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979. The Anti-Racketeering Act, in turn, was based on several provisions of the New York Penal Code and the Field Code. *See NOW II*, 537 U.S. at 403. In 1946, Congress enacted the Hobbs Act, in response to this Court's interpretation of the Anti-Racketeering Act in *United States v. Teamsters*, 315 U.S. 521 (1942). *See United States v. Enmons*, 410 U.S. 396, 401-04 (1973). The 1946 version of the Hobbs Act broadened the coverage of the statute to encompass extortionate union activity, which this Court's *Teamsters* decision had held was exempted from the provisions of the 1934 statute. *Id.* Finally, in 1948 Congress revised the statute again, producing the current phrasing of the Act. 18 U.S.C. § 1951(a).

The phrasing of the prohibition on threats or acts of violence that obstruct commerce is somewhat different in the 1934, 1946, and 1948 Acts. The 1934 Act separated the different types of violations into three different statutory subsections. All three subsections prohibited some aspect of threats or violence, and all references to threats and violence were specifically linked to extortionate activity. *See* Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979, § 2(a)-(c). The 1946 Act also separated the different types of violation into separate subsections, and the reference to violence in that Act also specifically linked prohibited threats or violence to acts of robbery or extortion. *See* Hobbs Anti-Racketeering Act of 1946, ch. 537, 60 Stat. 420,

§§ 2-5. In the 1948 revision, however, Congress combined the various prohibited activities into one provision, and rephrased the prohibition of threats and violence to omit the linkage to acts of robbery or extortion. *See* 18 U.S.C. § 1951(a).

Congress's general theme in all three of these statutes is the same: to protect interstate commerce by proscribing illegal and violent actions that obstruct commerce. The title of the 1948 revision makes this clear: According to the title, the Act prohibits "Interference with commerce by threats or violence." Likewise, during the debate over the 1946 revision, Representative Hancock responded to objections that the statute would potentially cover peaceful labor activity by noting that "This bill merely prohibits the wrongful use of force or threats. That cannot apply to a threatened strike because strikes are lawful, they are not wrongful." 91 Cong. Rec. 11902 (1945). In discussing Congress's authority to enact the Hobbs Act, this Court held that the Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence," and notes that the Act "outlaws such interference 'in any way or degree.'" *Stirone v. United States*, 361 U.S. 212, 215 (1960).

Although the legislative history is silent on Congress's reason for prohibiting all threats and acts of violence in the 1948 revision, it is not difficult to extrapolate the reason from Congress's broad intent to protect commerce from violent and illegal actions. The description in Section I., *supra*, of the comprehensive effects of threats and violence on the lawful provision of abortion and other reproductive health services provides an illustration of

how commerce can be obstructed—and indeed halted altogether—by such activities.

None of petitioners' remaining arguments justify their assertion that the Hobbs Act prohibition of threats and acts of violence should not be read as it is written.

First, petitioners assert that interpreting the Hobbs Act as it is written would "convert the Hobbs Act into a breathtakingly broad general federal 'anti-violence' statute." Operation Rescue Br. at 14. This claim is incorrect because it ignores the crucial and narrow limitation on prosecutions under the Hobbs Act: the Act applies only to acts or threats of violence that are part of a plan or purpose to obstruct, delay, or affect commerce. Ordinary acts and threats of violence do not come within the scope of the Act.

Second, petitioners assert that interpreting the Hobbs Act as it is written would "render superfluous numerous other federal statutes that address violence to persons or property in a more tailored manner." Operation Rescue Br. at 15. *See also* Scheidler Br. at 30. As noted above, the Hobbs Act is itself narrowly tailored to acts and threats of violence that are directed at obstructing, delaying, or affecting commerce. To the extent that the Hobbs Act covers actions also covered by other existing federal statutes, this is no different than the current state of affairs with regard to statutes other than the Hobbs Act. Notwithstanding the Hobbs Act, for example, there are multiple federal statutes prohibiting threats, and many of those statutes would cover the same conduct.[6] This Court

[6] *See* 18 U.S.C. § 871 (making it a crime to threaten president or successor to presidency); 18 U.S.C. § 873 (making it a crime to blackmail); 18 U.S.C. § 875 (making it a crime to make a threat through

(Continued on following page)

has never suggested that if Congress regulates a particular illegal activity in one statute, then all other statutes regulating the same activity are invalid.

Third, petitioners assert that interpreting the Hobbs Act as it is written would upset the balance of federal/state relations by "federalizing such traditional state offenses such as assault, battery, and destruction of private property." Operation Rescue Br. at 16. *See also* Scheidler Br. at 30. Once again, this ignores the crucial Hobbs Act limitation to acts obstructing, delaying, or affecting commerce. In any event, the fact that both the federal and state governments regulate criminal behavior does not justify invalidating legitimate Congressional action on a matter over which it has specific constitutional authority. As recently as five months ago, this Court reaffirmed Congress's authority to enact and enforce the Controlled Substances Act, 21 U.S.C. §§ 801-971, which criminalizes behavior that is also the subject of comprehensive regulation in every state. *Id.* "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a

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interstate communications); 18 U.S.C. § 876 (making it a crime to make a threat through the U.S. mail); 18 U.S.C. § 877 (making it a crime to make a threat through communications from foreign country); 18 U.S.C. § 878 (making it a crime to threaten foreign officials); 18 U.S.C. § 879 (making it a crime to threaten former presidents); 15 U.S.C. § 1692d(1) (making it a crime to threaten physical harm during the collection of a debt); 18 U.S.C. § 601 (making it a crime to threaten deprivation of employment or other benefit for political contribution); 18 U.S.C. § 844(e) (making it a crime to threaten the use of an explosive); 18 U.S.C. § 1030 (making it a crime to threaten harm to a government protected computer); 19 U.S.C. § 1341 (making it a crime to interfere with the function of an International Trade Commission employee by way of a threat); 42 U.S.C. § 300i-1(b) (making it a crime to threaten to tamper with public drinking water).

substantial effect on interstate commerce." *Gonzales v. Raich*, 125 S.Ct. 2195, 2205 (2005). There is little question that the regulation of acts and threats of violence that have the effect of stymieing an entire national industry falls within Congress's regulatory authority under the Commerce Clause—even if those activities are also subject to regulation by the states.

Fourth, petitioners argue that if the Hobbs Act is interpreted as it is written, it would lead to the pursuit of RICO actions "against social and labor protesters of all stripes, at least if acts (or perceived threats) of violence or property damage occur during protests." Scheidler Br. at 31. This claim rings hollow in the context of the facts of this case, in which petitioners' counsel conceded that petitioners engaged in criminal conduct directed at respondents. *See NOW II*, 537 U.S. at 408-09. As to other protesters, the Hobbs Act is subject to the same First Amendment limitations as all other federal statutes. *See, e.g., Watts v. United States*, 394 U.S. 705 (1969) (limiting prosecution under federal threats statute to a "true threat," and prohibiting the prosecution of ostensibly threatening language that amounted to mere political hyperbole). Legitimate political protest is not covered by the Hobbs Act and is not put at risk by the injunction in this case.

In sum, none of petitioners' arguments can overcome the clear mandate of the statutory language in this case. The facts and law are both clear: petitioners violated the Hobbs Act and should be enjoined.

CONCLUSION

This Court should affirm the lower courts' efforts to enforce the Hobbs Act and the imposition of a nationwide injunction against further violations of the Act.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 21 2005
OFFICE OF THE CLERK

Nos. 04-1244 & 04-1352

In The
Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR 47 MEMBERS OF THE UNITED STATES CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR 47 MEMBERS OF THE UNITED STATES CONGRESS AS *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

Amici curiae are Members of the United States House of Representatives. Their names, their political affiliations, and the Congressional Districts they represent are listed in the Appendix to this brief. Each Member believes that judicial interpretation of legislation according to plain statutory language is essential to the Constitutional separation of powers by which Congress and the federal judiciary work together as co-equal branches of government. Each Member believes that the statutes at issue in this case speak in plain language, to which this Court should faithfully adhere, making it a crime under the Hobbs Act to commit or threaten violence targeting interstate commerce and authorizing the federal courts to enjoin such conduct in private RICO Act lawsuits.[1]

SUMMARY OF ARGUMENT

When interpreting federal statutes, this Court acts as the "faithful agent" of Congress, with the judiciary and the legislature functioning as co-equal partners in the

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* or their counsel, make a monetary contribution to the preparation or submission of this brief. The consent of the parties to the filing of *amici curiae* briefs has been obtained and filed with the Clerk of the Court.

governance of our Nation. Such faithful agency is essential to the Constitutional separation of powers, for it prevents judicial encroachment on Congress's lawmaking role.

Faithful agency requires judicial adherence to plain statutory language, without resort to legislative history absent statutory ambiguity. This is essential to Congress's optimal performance. It provides an incentive for Congress to speak plainly; it discourages manipulation of the legislative record to promote individual lawmakers' agendas; it gives Congress a background of reliable judicial interpretation upon which Congress may depend to legislate; and it militates against this Court acting as Congress's taskmaster.

Interpreting the Hobbs Act as encompassing acts or threats of violence targeting interstate commerce, and interpreting the RICO Act as authorizing injunctive relief in private actions, is consistent with both of two competing theories of statutory interpretation – textualism and intentionalism. Both theories use the same methodology and yield the same result where, as here, statutory language is unambiguous. The text of the Hobbs Act plainly makes it a crime to commit or threaten violence in furtherance of a plan or purpose to obstruct, delay, or affect interstate commerce. The text of the RICO Act plainly authorizes the district courts to address RICO violations with injunctive relief. Thus, the legislative history of those Acts need not be investigated, whether one is a textualist or an intentionalist. Congress has spoken plainly; this Court should listen.

ARGUMENT

I. WHEN INTERPRETING FEDERAL STATUTES, THE SUPREME COURT ACTS AS THE "FAITHFUL AGENT" OF CONGRESS, REMAINING TRUE TO THE LEGISLATORS' WILL.

A. Faithful Agency Has Deep Roots in this Court's Jurisprudence.

It is axiomatic that Congress and the federal judiciary are co-equals in the governance of our Nation, with the Constitution drawing clear lines of demarcation between the legislative and judicial branches. Essential to this partnership is the notion of "faithful agency" – that the Supreme Court of the United States is neither the subordinate nor the taskmaster of Congress, but its partner in implementing legislation. "In our constitutional system, it is widely assumed that federal judges must act as Congress's faithful agents. On that assumption, if Congress legislates within constitutional boundaries, the federal judge's constitutional duty is to decode and follow its commands, particularly where they are clear." John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 5 (2001) (footnote omitted).

This assumption is shared by legal commentators across the jurisprudential spectrum. *See, e.g.*, Stephen Breyer, Active Liberty 86 (2005) (explaining that Founders expected judges, when applying codified law, "would remain faithful to the legislators' will"); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 63 (1994) ("We are supposed to be faithful agents, not independent principals."); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321, 325 (1990) (describing intentionalist theory

that "Court acts as the enacting legislature's faithful servant, discovering and applying the legislature's original intent."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 415 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature."); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 Va. L. Rev. 1295, 1313 (1990) ("Traditional democratic theory suggests that the court interpreting a statute must act as the faithful agent of the legislature's intent.").

Faithful agency is rooted in this Court's earliest jurisprudence – that of the Marshall Court – which "regarded federal judges as faithful agents of the legislature." Manning, *supra*, at 99. Thus, for example, as early as 1818, Chief Justice John Marshall explained that "when the legislature manifests [a] clear understanding of its own intention, which intention consists with its words, courts are bound by it." *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818). The primacy of faithful agency was well settled by the end of the nineteenth century. Manning, *supra*, at 102-05; *see, e.g., United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. . . . The courts have no function of legislation, and simply seek to ascertain the will of the legislator.").

"Hence, questions about the appropriate method of statutory interpretation must be debated, as they have been for the past century, on the assumption that, in matters of federal statutory interpretation, the federal

judge must act as the faithful agent of Congress." Manning, *supra*, at 127.

B. Faithful Agency Is Essential to the Constitutional Separation of Powers.

Faithful agency is a function of the Constitutional separation of powers. Its converse – unbridled latitude in statutory interpretation – leads to judicial encroachment on Congress's lawmaking role. "[T]he dogma of separation of powers . . . refers lawmaking exclusively to the legislature and would limit the courts to interpretation and application." Roscoe Pound, *The Theory of Judicial Decision*, 36 Harv. L. Rev. 940, 946 (1923). Thus, "when the Supreme Court assimilated the lessons of the separation of powers early in the nineteenth century, the faithful agent theory ultimately came to be its dominant interpretive methodology." Manning, *supra*, at 127.

> The Constitution does not generally prescribe rules of construction. But because all statutory interpretation is 'an interbranch encounter of sorts,' selecting an appropriate interpretive methodology involves inevitable choices about the institutional allocation of power between courts and legislatures. To the extent that our constitutional structure reflects considered judgments about that allocation of such power, it is essential to adopt rules of statutory interpretation that further, rather than detract from, the structural objectives established by the constitutional design.

Manning, *supra*, at 56-57 (footnotes omitted).

Congress rightly expects that the Supreme Court, acting as Congress's faithful agent, will remain true to the

constitutional separation of powers by following the plain language of federal statutes.

II. FAITHFUL AGENCY REQUIRES ADHERENCE TO PLAIN STATUTORY LANGUAGE.

A. The Plain Meaning Rule Precludes Resort to Legislative History Absent Statutory Ambiguity.

Faithful agency requires judicial respect for the plain meaning of statutory language. As Chief Justice Marshall said long ago, "Where there is no ambiguity in the words, there is no room for construction." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820). And as Justice Brennan said more recently, "A statute is not 'a nose of wax to be changed from that which the plain language imports. . . .'" *Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 518 (1979) (Brennan, J., dissenting).

The plain meaning rule restricts resort to extrinsic interpretative aids such as legislative history. "[T]here is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.'" *Ex Parte Collet*, 337 U.S. 55, 61 (1949); *see also* Laurence H. Tribe, Comment, *in* Antonin Scalia, A Matter of Interpretation 66 (1997) ("[I]t is the *text's* meaning, and not the content of anyone's expectations or intentions, that binds us as law."). "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true